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No. 404

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

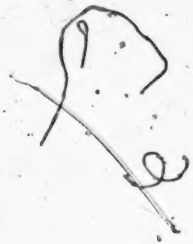
MEXICAN LIGHT & POWER COMPANY, LTD., *Petitioner*

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR PETITIONER

CARL G. STEARNS,
CHAS. W. BELL,
Counsel for Petitioner.



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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937 [U. S. C. A., Title 28, Sec. 344(b)].

Petitioner's cause of action is grounded upon a statute of the United States, being the Carmack and Cummings Amendments to the *Transportation Act* [49 U. S. C. A., Sec. 20(11)]. Petitioner's rights under the federal statute were specially set up and claimed in its trial pleading in the trial court (R. 2).

The trial court, the District Court of Nueces

County, Texas, rendered judgment adverse to petitioner on April 4, 1945, (R. 26). Appeal was perfected to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, which court on October 31, 1945, reversed the judgment of the trial court and rendered judgment in favor of petitioner (R. 55). Respondent's petition for writ of error was granted by the Supreme Court of Texas, which entered judgment on April 17, 1946, reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court (R. 110). The judgment of the Supreme Court of Texas became final on May 15, 1946, the date of the entry of its order overruling petitioner's motion for rehearing (R. 114).

The judgment of the trial court, the judgment and opinion of the Court of Civil Appeals (190 S.W.2d 838) and the judgment and opinion of the Supreme Court of Texas (193 S.W.2d 964) are included in the Record. Petition for writ of certiorari was granted by this Court on October 14, 1946.

STATEMENT OF THE CASE

Petitioner, a Canadian corporation, engaged in the light and power business in the Republic of Mexico, brought this suit against respondent, a railway corporation, engaged in the business of a common carrier for hire in interstate commerce, for damages suffered by petitioner resulting from the derailment of freight cars upon which certain property of petitioner was being transported within the Republic of Mexico, over the lines of National Railways of Mexico. Petitioner seeks to establish the liability of

respondent as the initial carrier of the shipment involved, within the meaning of the provisions of the Carmack and Cummings Amendment to the *Transportation Act* [49 U. S. C. A., Sec. 20, (11)], upon a bill of lading dated September 29, 1934, issued by respondent to one Fausto Trevino, petitioner's agent (R. 8A).

In the trial court the case was tried upon stipulations of the parties (R. 30-48). Thus, questions of law only are involved.

The undisputed facts, established by the stipulations, are most clearly stated in the opinion of the Court of Civil Appeals:

> "On September 20, 1934, Westinghouse Electric and Manufacturing Company delivered three specially built electric transformers and parts to the Pennsylvania Railroad Company for shipment to Laredo, Texas. This equipment had been purchased by appellant (petitioner here) and in the bill of lading issued by the Pennsylvania Railroad Company, said property was consigned to the Mexican Light & Power Company in care of Fausto Trevino, Customs Agent at Laredo, Texas. These transformers, etc., were loaded upon two Pennsylvania flat cars and transported over the lines of the Pennsylvania Railroad Company, Missouri-Kansas and Texas Ry. Co., Southern Pacific Lines, and The Texas-Mexican Railway Company to the freight yards of the latter railway company at Laredo, Texas.
>
> "While the cars loaded with appellant's property were waiting in the freight yards of the appellee (respondent here) at Laredo, said railway company issued to Fausto Trevino, appellant's agent, the document sued upon in this action.

This instrument is dated September 29, 1934, and by it The Texas-Mexican Railway Company acknowledged receipt of the electrical equipment here involved, and agreed 'to carry (the property received) to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination,'

"The shipment was consigned to Mexican Light & Power Company, Ltd., destination, El Oro, State of Mexico, route, via Acambaro.

"The disputed instrument was made out upon a form prepared for a domestic straight bill of lading. The receipt clause states that the property to be shipped is 'Received subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.' No rates or charges for carriage are set forth in the instrument which does, however, contain the following direction, set forth over the name of the consignor, Fausto Trevino, viz: 'The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.'

"After the instrument above described had been issued and delivered, the appellee moved the cars laden with appellant's property from its yards in Laredo to the middle of the International Bridge over the Rio Grande. Here the cars were picked up by the Mexican carrier and transported to the interior of Mexico, where a derailment occurred with resultant damage to appellant's property. This damage occurred on October 10, 1934.

"Appellant made claim for damages against the Mexican carrier, which was rejected. Suits were then filed against the Pennsylvania Railroad Company and The Texas-Mexican Railway Company, upon the apparently alternative theories, (1) that the Pennsylvania was an initial

carrier under the Sharon bill of lading, and (2) that The Texas-Mexican Railway Company was the initial carrier under the Laredo bill of lading.

"The action against the Pennsylvania was tried first and resulted in a judgment in favor of the carrier. Mexican Light & Power Company v. Pennsylvania R. Co. (District Court, Eastern District of Pa.), 33 Fed. Supp. 483.

"The Federal District Court held that the Sharon bill of lading issued by the Pennsylvania was not a through bill of lading to El Oro, Mexico, although it contained the notation, 'For export to: El Oro, Estado de Mexico, via Acambaro, via Laredo.' The court further held that under the Carmack Amendment, as amended by the first Cummings Amendment, a carrier receiving property at a point within the United States for shipment to a point within an adjacent foreign country was not required by law to issue a 'through bill of lading.' [For a statement of the history of the Carmack Amendment and various amendments thereto, see Ann. 49 U. S. C. A., Sec. 20, (11), p. 89; also Alwine v. Pennsylvania R. Co., ... Pa. ....., 15 Atl.2d 507.]

"Under the above holding, it is apparent that the Texas-Mexican Ry. Co. was under no legal obligation to issue a through bill to El Oro, Mexico. It appears from the stipulations that the proportionate part of the export freight rates charged and paid by appellant under the Sharon bill of lading was in payment for transportation to the international boundary line. Appellee could have taken a receipt for the property at this point and not issued a bill of lading calling for further shipment to a point within an adjacent foreign country over the lines of a foreign connecting carrier.

"However, appellee did not choose to follow this seemingly permissible procedure. It issued

an instrument which purports to be a through bill of lading and which clearly imports an obligation on the part of appellant to pay charges for transporting its property to El Oro, Mexico." (R. 50-51.)

The consideration paid by petitioner to respondent amounting to $248.70, was a proportion of 15.02% of the export rate from Sharon, Pennsylvania, and respondent stipulated that this payment represented compensation not only for transporting the shipment from Alice, Texas, to Laredo, Texas, but also for delivering the shipment at the international boundary line between United States and the Republic of Mexico. (R. 43.)

Throughout the entire course of the litigation respondent urged, as its defenses:

1. That the bill of lading issued by respondent was not intended to be a through bill of lading, but that it was merely intended to be a receipt given by respondent to evidence its obligation to place the shipment at the international boundary line for delivery to the National Railways of Mexico;

2. That if the instrument actually is a through bill of lading, it is unsupported by consideration and is unenforceable;

3. That if the instrument is a through bill of lading, it is illegal and void as violative of Title 49 U. S. C. A., Section 6 (1), (4), (5) and (7), which relate to the fixing and publication of rates, fares and charges for transportation and the fixing of uniform charges and rates. (R. 9-23.)

The trial court handed down no findings of fact or

conclusions of law but merely rendered judgment in favor of respondent. The Court of Civil Appeals held that the bill of lading issued by respondent and sued on in this case is a through bill of lading from Laredo, Texas, to El Oro, Mexico, that it is supported by a valuable consideration, and that the instrument is not illegal or violative of Section 6 (1), (4), (5) or (7) Title 49 U. S. C. A.

The Supreme Court of Texas, in reversing the judgment of the Court of Civil Appeals, and in affirming that of the trial court, did not pass upon or refer to the questions of whether or not the instrument sued on is a through bill of lading or whether or not it is violative of the provisions of 49 U. S. C. A., Section 6 (1), (4), (5) or (7), but held that it was not supported by consideration, and that, therefore, respondent was not liable under the instrument as an initial carrier within the meaning of the provisions of the controlling statute, 49 U. S. C. A., Section 20 (11).

In support of its holding the Supreme Court of Texas adopted the view that respondent received the shipment for transportation merely as an agent of the Pennsylvania Railroad, at Alice, Texas, under the bill of lading issued by the Pennsylvania Railroad requiring respondent to transport the shipment to the international boundary line, and that the Pennsylvania Railroad bill of lading was not discharged until the shipment reached the international boundary line on the bridge across the Rio Grande River; and that the entire transportation from Sharon, Pennsylvania to the international boundary line was governed by the

Sharon bill of lading and not by the bill of lading issued by respondent in Laredo, Texas.

The bill of lading issued at Sharon, Pennsylvania, by the Pennsylvania Railroad was held, in petitioner's suit against that Railroad (*Mexican Light & Power Co. v. Pennsylvania R. Co.*, 33 Fed. Supp. 483) not to be a through bill of lading to El Oro, Mexico, but merely a bill of lading to Laredo, Texas, the terms of which were fulfilled and the obligations thereunder discharged when delivery of the shipment was made to Trevino, petitioner's agent at Laredo.

Thus, under the holding of the Supreme Court of Texas, directly conflicting with the holding of the Federal Court in the Pennsylvania suit, petitioner is without a remedy in this case under either the Pennsylvania bill of lading, or the bill of lading issued by respondent.

It is stipulated that the damages sustained by petitioner on the date of the derailment of the freight cars (October 10, 1934) amounted to Thirteen Thousand, Seven Hundred and Fifty Dollars ($13,750.00) and that in the event of a recovery of damages by petitioner in this case, the judgment should be for such sum, together with interest and costs. (R. 44.) It has heretofore been, and is now, conceded by petitioner that the attorneys' fees originally sought to be recovered by it in this case are not recoverable in this suit. The judgment of the Court of Civil Appeals, which was reversed by that of the Supreme Court of Texas, was one awarding a recovery to petitioner of the sum of $13,750.00, with interest thereon from October 10,

1934, until paid, at the rate of 6% per annum and for costs. (R. 55.) It is such judgment of the Court of Civil Appeals which is here sought by petitioner to be sustained.

SPECIFICATION OF ASSIGNED ERRORS

All of the errors specified below were assigned in petitioner's motion for rehearing in the Supreme Court of Texas. (R. 111-114.)

First Assignment of Error

[First Assignment of Error in Court Below (R. 111)].

The Supreme Court of Texas erred in holding that no consideration whatever moved to respondent or from petitioner for the issuance of the Laredo bill of lading (the bill of lading issued by respondent, dated September 29, 1934).

Second Assignment of Error

[Second Assignment of Error in Court Below (R. 111)].

The Supreme Court of Texas erred in holding that respondent received the shipment involved for transportation as an agent of the Pennsylvania Railroad under a bill of lading issued by the Pennsylvania Railroad imposing upon respondent the duty to transport same to the international boundary line, in direct contradiction of respondent's express pleading to the effect that respondent was not a delivering carrier of

the shipment either in fact or in contemplation of the Cummings Amendment to the Federal Transportation Act.

Third Assignment of Error

[Third Assignment of Error in Court Below (R. 112)].

The Supreme Court of Texas erred in holding that respondent did not receive the "property for transportation" within the meaning of the provisions of 49 U. S. C. A., Sec. 20 (11), to the effect that a common carrier receiving property for transportation from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable as an initial carrier as otherwise provided therein.

Fourth Assignment of Error

[Fourth Assignment of Error in Court Below (R. 112)].

The Supreme Court of Texas erred in holding that respondent did not transport or undertake to transport the shipment over any portion of its own line under the bill of lading issued by respondent to petitioner.

Fifth Assignment of Error

[Fifth Assignment of Error in Court Below (R. 112)].

The Supreme Court of Texas erred in holding that

the consideration paid respondent under the Sharon bill of lading did not constitute also a consideration for the issuance by it of the new bill of lading issued by respondent providing for transportation of the shipment from Laredo, Texas, to El Oro, Mexico.

Sixth Assignment of Error

[Sixth Assignment of Error in Court Below (R. 112)].

The Supreme Court of Texas erred in failing to hold that the bill of lading issued by respondent is a valid through bill of lading from Laredo, Texas, to El Oro, Mexico, within the meaning of 49 U. S. C. A., Section 20 (11).

Seventh Assignment of Error

[Seventh Assignment of Error in Court Below (R. 112)].

The Supreme Court of Texas erred in failing to hold that respondent's issuance of the bill of lading of September 29, 1934, is fully supported by valuable consideration.

Eighth Assignment of Error

[Eighth Assignment of Error in Court Below (R. 112)].

The Supreme Court of Texas erred in failing to hold that the through bill of lading issued by respondent was a valid legal through bill of lading from Laredo, Texas, to El Oro, Mexico.

Ninth Assignment of Error

[Ninth Assignment of Error in Court Below (R. 112)].

The Supreme Court of Texas erred in finding and holding that the shipment involved never moved over respondent's own lines but began on and moved wholly over the lines of National Railways of Mexico.

Tenth Assignment of Error

[Tenth Assignment of Error in Court Below (R. 113)].

The Supreme Court of Texas erred in failing to hold respondent liable for the damages to the shipment involved, as initial carrier under the provisions of U. S. C. A. Title 49, Sec. 20 (11).

Eleventh Assignment of Error

[Eleventh Assignment of Error in Court Below (R. 113)].

The Supreme Court of Texas erred in reversing the judgment of the Court of Civil Appeals in favor of petitioner and in affirming the judgment of the trial court in favor of respondent.

Twelfth Assignment of Error

[Twelfth Assignment of Error in Court Below (R. 113)].

The Supreme Court of Texas erred in so construing the Federal Statute involved, U. S. C. A. Title 49, Section 20 (11), as to relieve respondent from the liability

therein imposed as an initial carrier of the shipment involved under respondent's bill of lading dated September 29, 1934.

Thirteenth Assignment of Error

[Thirteenth Assignment of Error in Court Below (R. 113)].

The Supreme Court of Texas erred in holding that movement of the freight under respondent's bill of lading began "if at all, in the center of the International Bridge at the beginning point of the National Railways of Mexico and continued wholly on such lines."

Fourteenth Assignment of Error

[Fourteenth Assignment of Error in Court Below (R. 113)]

The Supreme Court of Texas erred in failing to hold that the movement of the freight under respondent's bill of lading began, and was initiated in the freight yards of respondent in Laredo, Texas, at which point the shipment was located and from which it had not been removed at the time of the issuance by respondent of its bill of lading, under the undisputed stipulated facts.

SUMMARY PREFACE TO ARGUMENT

Inasmuch as the Supreme Court of Texas did not pass upon or refer to respondent's two defenses under which respondent contended that the bill of lading sued on was not intended to be a through bill of lading and

that if it be a through bill of lading, it is illegal and unenforceable as violative of Title 49, U. S. C. A., Section 6 (1), (4), (5) and (7) relating to the fixing and publication of rates, fares and charges for transportation and the fixing of uniform charges and rates, but held solely that the bill of lading sued on is not supported by valuable consideratoin, it will be the purpose of petitioner in the Argument to discuss primarily the question of the correctness or incorrectness of the actual holding of the Supreme Court of Texas as to the matter of consideration supporting the bill of lading involved. It is believed that it will be demonstrated that the holding of the Supreme Court of Texas is based not only upon a misconception of the legal effect of both of the bills of lading upon which this shipment moved from Sharon, Pennsylvania, to El Oro, Mexico, but, as well, upon a corollary misinterpretation of the express provisions of the Federal Statute imposing initial carrier liability.

Anticipating that respondent will again urge the two defenses asserted by it and not passed upon by the Supreme Court of Texas, petitioner will address a brief portion of its argument to each of them—it being petitioner's position that the holding of the Court of Civil Appeals which was directly made on all of respondent's defenses adversely to respondent's contentions, is correct.

BRIEF OF THE ARGUMENT

Point I.

(Under First-Fourteenth Assignments of Error, inclusive)

Respondent's Issuance of the Bill of Lading of September 29, 1934, is Fully Supported by Valuable Consideration.

Statement, Argument and Authorities

The applicable provisions of the Federal Statute upon which this suit is grounded [U. S. C. A., Title 49, Sec. 20 (11)] are quoted in an appendix, pages 38-39 of this brief.

These statutory provisions have been discussed and construed by this Honorable Court and by other courts of this country, both state and federal, on many occasions. The courts have repeatedly recognized and given effect to the legislative purpose of creating uniformity of responsibility on the part of carriers, and of providing a remedy, legal as well as practical, to shippers, for damages sustained by them, by reason of injury or damage to their property at points remote from the origin of shipments, while in transit in the course of shipments initiated by one carrier and continued on another, or other connecting carriers, in interstate commerce or in commerce between the United States and adjacent foreign countries. By its positive and mandatory terms, the statute undertakes to prevent circumvention of its provisions by any character of subterfuge. This attribute of the statute is of the

utmost significance in this case by reason of the nature of the contentions made by respondent in seeking to avoid the liability imposed upon it by the statute.

In its pleadings in the trial court, respondent took the position that, with relation to the shipment involved, it was merely an "intermediate" carrier and "neither an originating or delivering carrier of such shipment, either in fact or in contemplation of the Cummings Amendment to the Transportation Act, known as 49 U. S. C. A., Par. 20, Sec. 11." (R. 17.) This was the purely voluntary legal position taken by respondent in this case with full knowledge of all of the facts, which, as has been stated, were stipulated.

However, the Supreme Court of Texas, in holding that the bill of lading issued by respondent was not supported by consideration, held that respondent, in delivering the shipment to the international boundary line, was acting as a delivering carrier under the Pennsylvania bill of lading. (R. 107-8.) Although this holding supports another of respondent's contentions to the effect that the money which it was paid for its participation in the shipment was under the Pennsylvani. bill of lading, it completely strips itself of either consistency or factual support as it is actually a holding that respondent received the money as a delivering carrier under the Pennsylvania bill of lading when, from the inception of this litigation, and at all times since, respondent has not only admitted, but has asserted that it was not a delivering carrier under any bill of lading.

The Court of Civil Appeals recognized and held (R. 52) that respondent was paid for transportation to the international boundary line all of the money that could legally be paid to it and could not lawfully have received any additional sum of money for transporting the property from its yards in Laredo to such boundary line in view of the rules and regulations of the Interstate Commerce Commission relating to the establishment of uniform tariffs. We do not understand that respondent makes any contrary contention in this respect.

Petitioner paid, and respondent received, all of the monetary payment legally permitted to be paid and received for respondent's participation in this shipment, including respondent's issuance of its own bill of lading, whether or not its transportation of the shipment from its own yards in Laredo to the international boundary line was performed under its own bill of lading or the Pennsylvania bill of lading, often referred to in the Record as the "Sharon bill of lading." Respondent delivered shipments generally, including the one involved in this case, at the boundary line under an admitted arrangement whereby the shipment was to be received by the National Railways of Mexico. Respondent knew that this shipment, which it delivered to the international boundary line, would be taken over by the National Railways of Mexico for delivery to El Oro. (R. 32, 45.) Respondent was under no obligation to issue a new bill of lading, but, for reasons of its own, did so. As was pointed out in the opinion of the Court of Civil

Appeals (R. 52), respondent could have taken a receipt for the property and could have refrained from issuing a bill of lading calling specifically and unequivocally for further shipment to a point within Mexico over the lines of a foreign connecting carrier. However, respondent did issue the bill of lading and must have done so for purposes of its own, and in order to insure that the shipment should move from its yards in Laredo to the point of destination in Mexico under its own bill of lading containing the terms, conditions and provisions embodied within it. This was a manner of handling the shipment voluntarily selected by respondent before it moved the shipment from its yards in Laredo to the international boundary line. Petitioner had no control over this, just as it had no control over the manner in which respondent handled its participation in the shipment generally, or the fixing of the freight charges paid by it to respondent. Respondent is a common carrier for hire, and was paid as such, for its participation in the transportation of this shipment, however and in whatsoever manner respondent elected to handle its portion of such transportation, including its issuance of the bill of lading sued on.

As was held by the Court of Civil Appeals (R. 52) respondent's issuance of its own through bill of lading to El Oro, Mexico, made unnecessary any contract of carriage between petitioner and the Mexican carrier, as the effect of respondent's bill of lading was an arrangement for transportation of the property to its ultimate destination, El Oro. When these

undisputed facts are viewed realistically, the conclusion is inescapable that in issuing its own bill of lading, respondent received not only the monetary consideration paid to it but the additional legal benefit of selecting and, indeed, furnishing the particular type of contract under the terms of which it desired the transportation to be controlled from its yards in Laredo to El Oro. That this was a valuable benefit to respondent, it cannot deny.

Likewise, one of the purely practical aspects of respondent's issuance of its own bill of lading was the acceptance of such bill of lading by petitioner, through its agent, Trevino, and Trevino's foregoing the obtaining from the Mexican carrier of some express contract with it to cover, among other things, redress for damages to the shipment while in transit on the Mexican lines. This certainly constitutes, within itself, a sufficient consideration wholly apart from the benefits and advantages, legal and pecuniary, to respondent by reason of its issuance of its own bill of lading. In *Hendrick v. Lindsay, et al* (U. S. Supreme Court, 1876) 93 U. S. 143, 23 L. Ed. 855, this Honorable Court stated the rule as follows:

> "* * * In Pillans v. Van Mierop, 3 Burr. 1663, the court say, 'That any damage or suspension of a right, or possibility of a loss occasioned to the plaintiff by the promise of another, is a sufficient consideration for such promise and will make it binding, although no actual benefit accrues to the party promising.' This rule is sustained by a long series of adjudged cases."

This fundamental and familiar principle of law

relating to the element of consideration in contracts was lost sight of by the Supreme Court of Texas, and it is believed that the principal reason that the court did not recognize the applicable principle was its misconception of the legal effect of the two bills of lading under the Federal Statute and its misinterpretation of this Honorable Court's decision in the case of *Missouri-Kansas and Texas Ry Co. v. Ward* (U. S. Supreme Court, 1916) 244 U. S. 383. The Supreme Court of Texas, in the instant case, held that the Sharon bill of lading controlled the shipment clear to the international boundary line. Such holding directly conflicts with the holding of the Pennsylvania Federal Court in petitioner's suit against the Pennsylvania Railroad, wherein the court held that the Sharon bill of lading was "fulfilled and the defendant (Pennsylvania Railroad) discharged from further obligation to transport the goods when it delivered them to Trevino, the plaintiff's agent at Laredo. This does not constitute a through bill of lading to points in Mexico beyond Laredo" (33 Fed. Supp. 485). The Sharon bill of lading (R. 32A) designated the destination of the shipment under that bill of lading as Laredo, Texas. Respondent itself, upon the arrival of the shipment in its yards in Laredo, apparently regarded the shipment under the Sharon bill of lading as having stopped at that point and apparently regarded the legal effect of the Sharon bill of lading as having ceased at that point, otherwise, there is little, if any, logical explanation for respondent's having issued, on the following day,

its own new bill of lading covering the shipment from its yards in Laredo to the Mexican destination, El Oro. This placing by respondent of its own interpretation on the Sharon bill of lading is particularly significant, it is submitted, in view of the positive position taken by respondent in this case, that it was not a delivering carrier under the Sharon bill of lading or any other bill of lading. From respondent's overt action in issuing its own new bill of lading and from its assertion in its pleadings in this case that it was not a delivering carrier, it is believed to be a fair, if not, indeed, an inescapable inference that, for reasons of its own, respondent has never wished to occupy the position of a delivering carrier under the Sharon bill of lading.

The Supreme Court of Texas, in support of its holding relating to claimed want of consideration cites the case of *Missouri, Kansas & Texas Ry. Co. v. Ward,* supra. In that case a second bill of lading was issued by a connecting carrier to cover a portion of the transportation already entirely covered by a preceding bill of lading issued by the initial carrier. In the suit on the original bill of lading a provision embodied in the second bill of lading was sought to be utilized as a defense. This Court held that the first bill of lading governed the entire transportation to the ultimate destination as its terms plainly provided, and that the second bill of lading was, therefore, not supported by consideration. Petitioner not only does not question the correctness of the holding in that case but believes it to be entirely sound. However, it

has no application whatsoever to the facts of the instant case. The very marked distinction between the situation in the *Ward* case and that in the instant case is at once apparent. Here the Sharon bill of lading did not even purport to cover the transportation to the ultimate desination, El Oro, Mexico, but expressly designated the destination under that particular bill of lading as Laredo, Texas. In the federal suit in Pennsylvania, petitioner sought to hold the Pennsylvania Railroad liable as initial carrier under the Sharon bill of lading under the theory that it constituted a through bill of lading t o El Oro, Mexico, but petitioner's contention in that respect was stricken down by the holding of the cou in that case establishing that the destination designated in the Sharon bill of lading as Laredo, Texas, was controlling, and that that bill of lading did not cover the transportation of the shipment from Laredo, Texas, to El Oro, Mexico.

It is to be borne in mind that, in the instant case, petitioner first made claim for its damages on National Railways of Mexico which rejected petitioner's claims and petitioner thereupon filed suit at about the same time against the Pennsylvania Railroad on the Sharon bill of lading in the Federal Court in Pennsylvania and against respondent on respondent's bill of lading in the State Court in Texas. (R. 44, 45.) The Federal Court in Pennsylvania held that the legal effect of the Sharon bill of lading ceased upon arrival of the shipment in Laredo. The Supreme Court of Texas, in this suit, has held that the legal effect of the Sharon bill of lading did not cease upon

arrival of the shipment in Laredo but controlled the shipment beyond Laredo, the destination designated in the Sharon bill of lading, to the international boundary line, and that respondent, in moving the shipment from its yards in Laredo to the international boundary line subsequent to its issuance of its own bill of lading was acting under and was governed by the Sharon bill of lading, and that the shipment under the Laredo bill of lading began "if at all, in the center of the International Bridge at the beginning point of the National Railways of Mexico and continued wholly on such lines." (R. 109.)

As to the legal effect of the Sharon bill of lading and particularly as to the point and time at which it ceased to have legal effect, either the holding of the Federal Court in Pennsylvania is correct or the holding of the Supreme Court of Texas is correct. Obviously, they cannot both be correct. Petitioner has no apology to make for having pursued the alternative courses against the Pennsylvania Railroad under its bill of lading and against respondent under its bill of lading. At the time petitioner filed the two suits both railways were denying liability and there had, of course, been no judicial ascertainment of the legal effect of either bill of lading. Obviously it was petitioner's desire to establish its legal rights, if any it had, under either of the two bills of lading under which the shipment moved. It is true that in the Pennsylvania suit petitioner asserted the liability of the Pennsylvania Railroad under its bill of lading at the same time it was asserting the liability of res-

pondent in this suit as initial carrier under its bill of lading. For whatever it may be worth, it is the present conviction of Briefers that the holding of the Pennsylvania Court was and is correct and that, under the Federal statute involved, respondent is the legally liable initial carrier under the bill of lading which it issued.

It is submitted that the holding of the *Ward* case, supra, is not controlling of the instant situation and that the Supreme Court of Texas was in error in failing to discern the difference between the facts of the *Ward* case and of the instant case.

The Supreme Court of Texas further held that respondent did not receive the "property for transportation" at Laredo, within the meaning of the Federal statute, and in support of such holding cites the case of *Ga. So. & F. Ry. Co. v. Tipton Produce Company*, 176 S. E. 89, wherein actually the railroad company sought to be held liable under a bill of lading which it had issued never handled any portion of the shipment, and never even came in physical contact with any part of the shipment. It had merely issued a bill of lading under a standing arrangement or agreement with an associated carrier. That case is clearly not an authority supporting the holding of the Supreme Court of Texas in the instant case, where respondent handled the shipment all the way from Alice, Texas, to the international boundary line, on its own line, and with its own equipment, and through its own employees.

The case of *Panhandle & S. F. Ry. Co. v. McCrum-*

men, 240 S. W. 607, cited by the Supreme Court of Texas in support of its holding, was a case decided by the Court of Civil Appeals of Texas, at Amarillo, which did not involve the federal statute, but which was decided upon the court's construction of certain state statutes regulating intrastate commerce, the shipment involved having been wholly within the State of Texas, beginning at Paris, Texas, and terminating at Lubbock, Texas. The decision in that case has no bearing whatsoever on the question here presented.

In the case of *Rice v. Oregon Short Line Ry. Company,* 198 Pac. 161, the court held liable as the initial carrier the defendant, Oregon Short Line Railway Company, which had issued a second bill of lading in the course of transportation of a shipment originating under a prior bill of lading. The court held that all of the obligations of the first bill of lading had terminated, and that the Oregon Short Line Railway Company was the initial carrier under the bill of lading issued by it, and was, as such, liable for damages occurring on the line of the Union Pacific Railway Company, a connecting carrier. The court held:

> "We conclude that liability for damages as an initial carrier depends upon the reception of the goods in one state for transportation to a point in another state or territory, rather than the intention which the shipper may have had at the time of loading the cars, but which does not find expression in some form of a contract, and that where all the obligations of a previous contract of shipment are terminated, and there has been a delivery to the consignee prior to the making of a subsequent contract for shipment into another

state, the carrier of the property under the subsequent contract of shipment is the initial carrier under the Carmack Amendment. In this case appellant was the initial carrier. Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; South. Pac. v. Ariz., 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713. See, also, Chesapeake & O. Ry. Co. v. National Bank of Commerce, 122 Va. 471, 95 S. E. 454."

In the instant case, the obligations of the Sharon bill of lading ceased under the holding of the Federal Court in Pennsylvania upon the arrival of the shipment in Laredo; and the continuation of the shipment from respondent's yards in Laredo clear to El Oro, Mexico, was under respondent's own bill of lading, and it alone, as the Mexican line issued none.

In *Louisville & Nashville Ry. Company v. Johnson*, 206 S. W. 638, plaintiffs delivered a shipment of horses and mules to the Southern Pacific Railway Company at Battle Mount, Nevada, to be transported to Mt. Sterling, Kentucky. The Southern Pacific issued a through bill of lading to Mt. Sterling. When the horses and mules reached East St. Louis a new contract of carriage was entered into between the shippers and the Louisville & Nashville Railway Company. The first bill of lading was surrendered at the time the second bill of lading was issued. The Louisville & Nashville Railway Company transported the horses and mules to Howell, Indiana, where they were turned over to the Louisville, Henderson & St. Louis, and the latter railway, together with the Chesapeake & Ohio, transported them to Mt. Sterling, Kentucky,

the destination. The freight charges on the entire shipment from Battle Mount, Nevada, to Mt. Sterling, Kentucky, were paid at destination. In holding that the Louisville & Nashville Railway Company was the initial carrier under the statute under discussion, by reason of its issuance of the second bill of lading, the court said:

> "It does not appear that the shippers obtained any advantages in rates by virtue of the new contract. There is nothing in the circumstances to show that the transaction was a mere subterfuge or device to evade the statute. On the contrary, it appears that the parties acted in perfect good faith. It will thus be seen that the old contract was in fact abandoned, and a new contract was executed, and we find nothing in the statute that denies such power to the contracting parties. We therefore conclude that the Louisville & Nashville Railroad Company, by canceling the old and issuing the new contract, assumed the liability of an initial carrier, and that the trial court did not err in so holding."

The decisions quoted from, we submit, clearly control the situation in the instant case, and definitely establish the liability of respondent, as the initial carrier under the bill of lading issued by it on September 29, 1934.

Other decisions in point are:

Southern Produce Company v. Norfolk Southern R. Co. (Supreme Court of Appeals of Va., 1926) 132 S. E. 360;

Chase & Co. v. Florida East Coast Ry. Co., (Supreme Court of Fla., 1927), 115 So. 825.

Respondent, in its Reply to the petition for writ of

certiorari filed in this Court (Reply p. 28) seeks, as it did in the state courts, to utilize as defensive matter the fact that it had no agreement with the Mexican lines to be reimbursed for damages occasioned by the negligence of those lines and had no agreement with the Mexican lines to receive any portion of any charges paid for services performed by the Mexican lines. As pointed out in the opinion of the Court of Civil Appeals (R. 54) "the liability of the initial carrier under the Interstate Commerce Act is in no way dependent upon agreements between the initial carrier and the connecting carrier." (R. 54.) That the existence or nonexistence of such an agreement is immaterial as was held by the Court of Civil Appeals is believed to be correct. However, insofar as respondent seeks to utilize the absence of such agreements as constituting the basis of claimed hardship upon it if held liable in this case, it is believed appropriate to refer to the intercorporate relationship between respondent and the National Railways of Mexico as reflected by the stipulations. (R. 46, 47.) Petitioner does not contend, and has never contended that such intercorporate relationship has anything whatever to do with respondent's liability as initial carrier under the Federal statute, and the holding of the Court of Civil Appeals to the effect that such intercorporate relationship is immaterial matter is thought to be correct insofar as the question of respondent's liability is concerned. It is, however, believed to be significant as demonstrating that the absence of recoupment agreements between respondent and the National

Railways of Mexico is a matter for which respondent itself is responsible and is something over which petitioner had no control and in which it had no voice. Certainly, we submit, respondent's failure to have such an agreement or agreements, is not a matter to be utilized for the purpose of defeating recovery in this case.

It is further submitted that under a correct application of the provisions of the Federal statute, respondent is liable as initial carrier under the bill of lading issued by it and that the Supreme Court of Texas erred in failing to hold that such bill of lading was supported by consideration.

Point II.

(Under Sixth, Tenth and Twelfth Assignments of Error)

The Instrument of September 29, 1934, Issued by Respondent to Petitioner's Agent, Fausto Trevino, is a Through Bill of Lading to El Oro, Mexico, Within the Meaning of U. S. C. A. Title 49, Section 20 (11).

Statement, Argument and Authorities

The document issued by respondent is on respondent's regular printed form, designated in its caption as "Uniform Straight Bill of Lading." It designates the consignment to "Mexican Light & Power Co., Ltd.", Destination "El Oro, Mexico—Route via Acambaro," which is a town in Mexico.

In view of arguments heretofore made by respondent to the effect that it was not its intention in issuing the document of September 29, 1934, to issue a through bill of lading to El Oro, Mexico, it is important that

these factors be borne in mind: (1) On September 28, 1934, the cars bearing the shipment involved were in respondent's freight yards at Laredo, Texas, to which point the shipment had moved under the Sharon bill of lading; (2) on September 29, 1934, the following day, respondent issued its bill of lading to Fausto Trevino, and thereupon transported the shipment over its line of railroad to the international boundary line on the International Bridge between Laredo, Texas, and Nuevo Laredo, Mexico, where the shipment was received "by National Railways of Mexico, for further transportation to El Oro, Mexico" (R. 32); (3) absolutely nothing was said or done by respondent, at the time of its issuance of its bill of lading, or at any other time, until after this suit was filed, to indicate that it was its intention for the document to mean or constitute anything other than what it purports on its face to constitute—a through bill of lading to El Oro, Mexico, via Acambaro; (4) at the time respondent issued such document, on Septembr 29, 1934, it had an operating agreement with the National Railways of Mexico that upon respondent's delivery of the cars at the international boundary line, the National Railways of Mexico would receive said property and equipment on such cars. (R. 45.)

Not only, therefore, does the instrument of September 29, 1934, issued by respondent, on its face unequivocally route the shipment to El Oro, as the destination point via Acambaro, but as stipulated by the parties, the shipment upon its delivery by respondent to the international boundary line "was received by

National Railways of Mexico for further transportation to El Oro, Mexico."

Likewise, the entire transportation from Laredo to El Oro was made under the bill of lading issued by respondent, and under no other. Respondent does not contend that any other or additional bill of lading, receipt or contract was issued by the National Railways of Mexico. The bill of lading issued by respondent was a complete and unequivocal contract for transportation from Laredo via Acambaro to El Oro.

The Supreme Court of Texas did not hold that the bill of lading sued on is not a through bill of lading, and the Court of Civil Appeals expressly held that it is. "It is anticipated that respondent will again urge its argument that its bill of lading is not a through bill of lading within the meaning of the federal statute.

In this particular connection, the decisions which are most closely in point are those of the Supreme Court of Idaho in *Rice v. Oregon Short Line Ry. Co.*, 198 Pac. 161, and *Barrett v. Northern Pacific Ry. Co.*, 157 Pac. 1016, and of the Court of Appeals of Kentucky in *Louisville & Nashville Ry. Company v. Johnson, et al.*, 206 S. W. 638, and of the Court of Civil Appeals at Galveston in the case of *Houston E. & W. T. Ry. Co. v. Houston Packing Company*, 221 S. W. 316 (writ of error refused).

The cases of *Rice v. Oregon Short Line Ry. Co.* and *Louisville & Nashville Ry. Co. v. Johnson* have been discussed and quoted from under Point I.

In *Barrett v. Northern Pac. Ry. Co., supra*, the shipper delivered to the C. B. & Q. Ry. Company at Con-

nelsville, Missouri, a stock of drugs and fixtures to be shipped from that point to Spokane, Washington. The goods were routed by the C. B. & Q. Ry. Company over its line and that of Northern Pacific Railway Company. Before the shipment reached the destination to which it had been consigned, the shipper called upon the Northern Pacific Railway Company to have the shipment forwarded, upon its arrival, to Rupert, Idaho. The Northern Pacific Railway Company thereupon altered the original bill of lading by striking out the name "Spokane" as the destination of the car and in lieu thereof inserted "Rupert, Ida." After some delay the car reached Rupert, and upon being opened, it was found that a part of the goods was missing and a large portion of the remainder was in a badly damaged condition. The suit was against the Northern Pacific Railway Company to recover damages under the federal statute invoked in the instant case.

The court held that the contract of the C. B. & Q. Railway Company was fully performed and complied with by it when the shipment reached Spokane, and that as between the shipper and the Northern Pacific Railway Company, the latter was the initial carrier under the statute under the new contract created by alteration of the original bill of lading. The court held:

> "While appellant did not issue a new bill of lading, it altered the one issued by the Chicago, Burlington & Quincy Railroad Company and adopted it as its own obligation. Even had it not done this, but had accepted the consignment upon

an oral agreement to deliver it, although the act of Congress under consideration expressly requires a common carrier to issue a receipt or bill of lading for goods accepted for transportation from one state into another, it is not necessary to the right of the shipper to recover for loss of or damage to the shipment that it do so. International Watch Co. v. Delaware, L. & W. R. Co., 80 N. J. Law, 553, 78 Atl. 49; Thompson v. San Antonio & A. P. Ry. Co., 11 Tex. Civ. App. 145, 32 S. W. 427; Aton Piano Co. v. Chicago, M. & St. P. Ry. Co., 152 Wis. 156, 139 N. W. 743.

"The evidence discloses that appellant transferred the goods to the Oregon-Washington Railroad & Navigation Company in the yards at or near Spokane. This fact does not relieve it from the liability imposed by law. The language of the act of Congress binds a common carrier which receives property for transportation from a point in one state to a point in another state for loss or damage which results from its own negligence or from that of any common carrier over which it routes the goods without regard to the distance it may transport them. The question is, did appellant receive the goods for such a shipment? The evidence shows, conclusively, that it did. A common carrier which receives goods for interstate shipment is the initial carrier, although it only switches the car in which they are loaded to the lines of another common carrier to be transported out of the state. Aton Piano Co. v. Chicago, M. & St. P. R. Co., supra."

Point III.

(Under Sixth and Tenth Assignments of Error)

Respondent's Bill of Lading of September 29, 1934, is Not Violative of Section 6, Title 49, U. S. C. A., but is a Valid Legal Contract.

Although the Supreme Court of Texas did not hold the instrument sued on to be invalid as violative of any subsection of Section 6, 49 U. S. C. A., and although the Court of Civil Appeals expressly held that it was not violative thereof, it is anticipated that respondent will again argue that the contract is violative of one or another of the subsections of such statute.

The parties stipulated "that when the shipment upon which this suit is founded was made, no through railroad tariff was in effect governing such shipment from either Sharon, Pennsylvania, or from Laredo, Texas, to El Oro, Mexico, or any other point in Mexico." (R. 37.) U. S. C. A. Title 49, Section 1(2), defines the transportation subject to regulation as being transportation within the geographical limits of the United States only. Thus, the Interstate Commerce Commission has no authority to establish rates or supervise methods of fixing and publicizing rates outside the territorial limits of the United States.

In *Alwine v. Pennsylvania R. Co.* (Sup. Court of Pennsylvania, 1940), 15 Atl.2d 514, the court held:

> "The courts have frequently pointed out limits to which Congress may not go in regulating movements in foreign countries. Joint through international rates are not required by law: Lewis-Simes-Jones Co. v. Southern Pacific Co., 283 U. S. 654, 660, 51 S. Ct. 592, 75 L. Ed. 1333. The Interstate Commerce Commission can fix rates to the border but not beyond the boundaries of this country: Black Horse Tobacco Co. v. Illinois Cent. R. Co., 17 I. C. C. 585."

This rule is uniformly recognized, and we have found no departure therefrom by any court. Other cases recognizing and applying the rule are:

Oregon-Washington R. & Nav. Co. v. Strauss & Co. (Cir. Ct. App., 9th Cir., 1934), 73 Fed.2d 912.

Goldberg v. Delaware L. & W. R. Co. (Municipal Ct. of City of New York, 1943), 40 N.Y.S.2d 44.

Northwestern Oil Co. et al. v. St. Louis-San Francisco Ry. Co., et al., 112 I. C. C. 488.

Tennessee Extract Corp. et al. v. Louisville & Nashville R. et al., 128 I. C. C. 709.

As pointed out by the Court of Civil Appeals in its opinion in the instant case (R. 53), the establishment of a through rate to a point in an adjacent foreign country is not a necessary prerequisite to the issuance of a legal and binding through bill of lading to such point, and "to so hold would go far toward defeating the obvious purpose of Congress in extending in part the provisions of the Carmack Amendment to shipments from a point in the United States to a point in an adjacent foreign country, as was done by the Cummings Amendment. The Record before us does not disclose that an illegal or unauthorized rate was in any way involved." Likewise, as pointed out in the opinion of the Court of Civil Appeals, it is well settled that even if an illegal rate were involved, the contract would not be void, and recovery thereon could not be defeated.

In the case of *Judge v. Northern Pac. Ry. Co.*, 189 F. 1014, the United States Circuit Court of Appeals held:

"The Interstate Commerce Commission forbids

rebates, special rates, preferences, etc., and makes all agreements in reference thereto void, but it does not make the contract of affreightment otherwise void, and there is nothing in the law which will excuse the carrier from liability when it has accepted property for transportation under such a contract."

Likewise in *Adams Express Co. v. Darden,* 286 Fed. 61, the court, in passing upon the effect of a violation of the Transportation Act, held:

"It is now well settled that, when a statute imposes specific penalties for its violation, where the act is not *malum in se,* and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the legislative intent to render such contracts illegal and unenforceable. Harris v. Runnels, 12 How. 79, 84, et seq., 13 L. Ed. 901; Farmers' & Mechanics' Nat. Bank v. Deering, 91 U. S. 29, 35, 23 L. Ed. 196; Fritts v. Palmer, 132 U. S. 282, 289, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 545, 22 Sup. Ct. 431, 46 L. Ed. 679; Yates v. Jones National Bank, 206 U. S. 158, 179, 27 Sup. Ct. 638, 51 L. Ed. 1002; Dunlop v. Mercer (C. C. A. 8), 156 Fed. 545, 555, 86 C. C. A. 435. This rule is not in conflict with, but is an exception to, the general rule that an action cannot be maintained upon an illegal contract."

CONCLUSION.

It is submitted that the holding of the Supreme Court of Texas in this case is erroneous and that its judgment should be reversed and the judgment of the Court of Civil Appeals should be sustained.

WHEREFORE, petitioner respectfully prays that the said judgment of the Supreme court of Texas may be reversed by this Honorable Court and the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas sustained; and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

Carl G. Stearns

CARL G. STEARNS,

Chas. W. Bell

CHAS. W. BELL,

Counsel for Petitioner.

I hereby certify that printed copies of this Brief were sent by registered mail to counsel for respondent, this the 12th day of December, 1946.

Chas. W. Bell

CHAS. W. BELL,

Counsel for Petitioner.

APPENDIX

49 U. S. C. A., Section 20 (11):

"Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt, or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation com-

pany to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to the value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: * * *"